

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: April 20, 2005

TO : Alan B. Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Automotive Machinists Lodge No. 1173,
Machinists Automotive Trades, 578-6007-6700
District Lodge No. 190 of Northern 578-6063
California, IAM (Future Ford) 578-8075-8050-9800
Case 32-CP-487-1

This Section 8(b)(7)(C) case was submitted for advice as to whether the Union's avowed area standards picketing, which followed an earlier round of recognitional picketing, was unlawful because it had a recognitional object. We agree with the Region that, under the totality of the circumstances, the Union's second round of picketing has a recognitional object, and is thus unlawful regardless of whether the picketing also had an area standards object.

FACTS

A. Background

Future Ford of Concord ("Employer" or "Future Ford") is engaged in the retail sale and service of automobiles in Concord, California. The Employer began operations on October 22, 2004 after purchasing the assets of Lithia Ford. Prior to the purchase, Lithia Ford was signatory to a collective-bargaining agreement with the Union¹ and Teamsters Local 315, which served as the joint bargaining representatives of the service department employees. Before the sale was finalized, during the week of October 18, 2004, Lithia Ford discharged all of its employees. When the Employer began operations the following week, it offered employment to some of the former Lithia Ford service department employees. Some accepted employment and others did not.²

¹ Automotive Machinists Lodge No. 1173, Machinists Automotive Trades District Lodge No. 1173, Machinists Automotive Trades District Lodge No. 190 of Northern California, IAM, AFL-CIO.

² The former Lithia Ford service department employees have never constituted a majority of the Employer's service department employees.

On October 28, 2004, Union Area Director Mark Hollibush contacted Employer co-owner Henry Hansel seeking recognition and bargaining. Hansel refused. The Union then distributed an "urgent message" informing its members that picketing against the Employer would begin on October 30, 2004, to protest the Employer's refusal to recognize the Union and rehire all of the former Lithia Ford employees.

On October 29, 2004, the Union filed a Section 8(a)(3) and (5) charge against the Employer, alleging that it unlawfully refused to hire former Lithia Ford employees so it could avoid a bargaining obligation with the Union and that it unlawfully refused to recognize and bargain with the Union.³

The Union began picketing the Employer on Saturday, October 30, 2004. About 15 to 18 picketers carried picket signs stating:

Please Do Not Patronize
Unfair Labor Practices
Automotive Machinists
Lodge 1173 I.A.M. and A.W.

A picketer who appeared to be in charge of the picketing activity used a bullhorn to disparage the Employer; shouted to a manager to negotiate a new contract with the Union; promised to stop driving the Employer's business away once the Employer signed a new contract with the Union; and threatened that customers would "meet their maker and go to hell" if they purchased a car from the Employer. The picketing continued every day through December 1, 2004. Beginning some time in December 2004 and continuing through February 6, 2005,⁴ the Union limited its picketing to weekends and Wednesdays.

The February/March issue of the "Sparkplug" Union newsletter contains an article about the picketing of Future Ford headlined "Fight for Future continues." The article states, inter alia, that the Contra Costa County Board of Supervisors and the city councils of Pleasant Hill and Martinez passed unanimous resolutions requesting that the Employer bargain with the Union, and that the "Union's

³ Case 32-CA-21701-1. After the Region dismissed the charge on January 31, 2005, the Union decided not to appeal, and requested to withdraw the charge.

⁴ All dates are in 2005 unless otherwise indicated.

next step is to take the issue to the Concord City Council, and use the political clout behind these resolutions to push the company into bargaining."⁵

B. The Cessation And Resumption Of Picketing

On February 10, the Region issued a complaint in Case 32-CP-485-1 against the Union, alleging that it violated Section 8(b)(7)(C) by picketing the Employer for a recognitional object for more than 30 days without a valid petition under Section 9(c) having been filed.⁶ In a letter dated February 10, the Union informed the Region that the Union would "not engage in any recognitional picketing pending our victory before the Board in defeating" the complaint in Case 32-CP-485-1.⁷ The Union did not picket from February 7 through February 18.

In a letter dated February 16, but postmarked February 17, the Union informed the Employer that it had ceased picketing "for any purported recognitional object," but that it would resume picketing in the near future "solely to advise the public that Future Ford does not pay area standards." The letter conditioned the cessation of the picketing upon the Employer's providing area standards, and requested that the Employer supply it with evidence if it was contending it did provide area standards. The Employer received the letter on February 18 or 19.

The Union's area standards investigation of the Employer had consisted solely of conversations with Future Ford employees. In late October 2004, a service technician informed the Union that the Employer paid \$28 per hour. In late January, a mechanic informed the Union that, under the Employer's health and welfare plan, he would have to pay \$600 per month to cover himself and his two children.⁸ On

⁵ It is not clear when the February/March issue of the newsletter was actually published or disseminated. Thus, the article refers to the Union's ULP charges against the Employer, but states that the Union did not yet know whether complaint would issue. Since the Union's charges were dismissed on January 31, the article may have been written in January.

⁶ The hearing in Case 32-CP-485-1 has been postponed indefinitely pending the resolution of the instant case.

⁷ After receiving these assurances, the Region decided not to seek a Section 10(1) injunction in that case.

⁸ Within a day or two, the Union called the service technician and left a message, but he did not call back.

February 7, a parts employee informed the Union that the Employer had no pension plan or 401(k) plan. On February 8 or 9, the service technician told the Union that the Employer's health and welfare plan required him to pay about \$650 per month and did not include disability, vision, or orthodontia; that life insurance was substantially less than under the Lithia Ford contract; that the Employer did not offer a pension plan; that there were rumors that the Employer might offer a 401(k) plan, but without Employer contributions; and that there were only going to be six holidays instead of the ten under the Lithia Ford contract.⁹ He reconfirmed that the Employer paid \$28 per hour. The Union did not contact the Employer as part of its area standards investigation.

The Union resumed picketing the Employer on Saturday, February 19, with picket signs stating:

Do Not Patronize
This Employer
Does Not Provide
Area Standard
Health Care and Pension

The picketers also distributed a two-sided leaflet to persons approaching the Employer. The first side of the leaflet states, inter alia, "Please Do Not Patronize"; "This Employer Does Not Provide Area Standard Health Care and Pension"; and asks customers to instead patronize certain named auto dealerships. The second side of the leaflet states, inter alia, that "Twenty four Unionized workers were unfairly terminated at Future Ford when the new owners refused to hire them back in an effort to break the Union"; "Contra Costa County Board of Supervisors, the City Council of Martinez and the City Council of Pleasant Hill have all unanimously passed resolutions in support of the terminated Union employees"; and urges people not to patronize the Employer.

On February 23, the Employer filed the instant charge alleging that the Union had picketed for more than 30 days with a recognitional object. In a letter to the Union dated February 24, the Employer stated that the Union's area standards claim was merely a cover for the Union's continued unlawful recognitional picketing, and that the Employer believed it provided wages, benefits, and working

⁹ Another service technician was present during this discussion with the Union.

conditions well in excess of those in the Union's contracts with the Contra Costa New Car Dealers Association (CCNCDA). The Employer asserted that, on average, its service technicians earn about \$880 more per month than they did when employed by Lithia Ford. The Employer demanded that the Union immediately send it detailed information regarding the makeup of the area standard.

The Union responded in a letter dated March 4. The letter stated that the Employer's February 24 letter was merely an attempt to gain discovery for its pending unfair labor practice charge. The Union further noted that its purpose was to inform the public that the Employer does not meet the area standard, and that the Employer's assertion that it offered superior wages, benefits, and working conditions referred to a different standard. The Employer has not responded to the Union's letter.

On March 10, Union president Steve Older, business representative Rick Rodgers, and a former Lithia Ford employee who was not hired by the Employer, appeared on a radio program to discuss the picketing, the Employer's failure to rehire the former Lithia Ford employees or recognize the Union, and the Employer's negative impact on area standards.¹⁰ About 12-13 minutes into the program, Older stated that the Union had already obtained resolutions from the Contra Costa County Board of Supervisors and the city councils of Pleasant Hill and Martinez supporting the Union and condemning the Employer, and that the Union would obtain a similar resolution from the Concord City Council within about a week. About 19 minutes into the program, in response to a question about "scabs," Rodgers stated that the Union wanted to do whatever it could to deter the Employer from hiring "scabs" willing to work for lower wages and benefits.

On March 21, the Union sent an internal memorandum to its members imploring them to continue picketing the Employer. The first paragraph of the two-page memorandum describes the Employer's refusal to rehire Lithia Ford employees in October 2004 as a "willful deception" and "ploy to evade having to recognize and negotiate a new contract with the union." The next paragraph begins by stating "[s]ince this struggle began last October...." The third paragraph states that the Union had successfully secured enthusiastic support from the County Board of

¹⁰ The radio program was "Living Room" with Kris Welch on KPFA 94.1 FM. The archived program may be accessed at <http://www.kpfa.org/archives/archives.php?id=17&limit=N>. (last visited April 18, 2005).

Supervisors, and the city councils of Pleasant Hill, Martinez, and Concord. The third paragraph also states: "Recently, we have begun to spread the story of our struggle at Future Ford by appearing on TV and radio programs that are very interested to learn of the employer's underhanded union busting tactics." The second half of the memorandum focuses on the Employer's negative impact on area standards.

ACTION

We agree with the Region that, under the totality of the circumstances, the Union's second round of picketing commencing on February 19 has a recognitional object. Given that the Union had already picketed for more than 30 days with no election petition being filed, complaint should issue, absent settlement, alleging that the renewed picketing violates Section 8(b)(7)(C). In this regard, it is irrelevant whether the renewed picketing also had an area standards objective.

A Union violates Section 8(b)(7)(C) when it pickets an employer with the goal of obtaining recognition if the picketing is conducted without an election petition being filed within a reasonable period of time not to exceed 30 days. Whether a union pickets with a recognitional object is a question of fact which may be inferred from the totality of the union's conduct.¹¹ To establish a violation, it is necessary to establish only that an object of the picketing is recognitional, even if other legitimate objects are also present.¹² A union's picketing for a recognitional object can be abandoned in favor of lawful "area standards" picketing, but the Board closely scrutinizes the union's avowed change in object.¹³

A. The Union's Second Round Of Picketing Had An Unlawful Recognitional Object.

Initially, the Region has already issued complaint alleging that the Union's first round of picketing, from

¹¹ Building Service Employees Local 87 (Liberty House/Rhodes), 223 NLRB 30, 33 (1976).

¹² Retail Clerks Local 1357 (Genuardi Supermarkets), 252 NLRB 880, 885 (1980).

¹³ Retail Clerks Local 899 (Giant Food), 166 NLRB 818, 822 (1967), enfd. per curiam 404 F.2d 855 (9th Cir. 1968); Sales Delivery Drivers Local 296 (Alpha Beta Acme Markets), 205 NLRB 462, 469 (1973).

October 30, 2004 until February 6, had an unlawful recognitional object. Thus, the Union had demanded recognition and bargaining from the Employer; urged its members to picket the Employer because of its failure to recognize and bargain; filed a ULP charge seeking recognition; and picketed with signs and handbills alleging ULPs where recognition was an inextricable part of the allegations.¹⁴ Finally, the Region determined that the Union was not the lawful collective-bargaining representative of the Employer's employees and dismissed the Union's charge.¹⁵

The primary evidence supporting a finding of a recognitional object in the picketing after February 19 is the Union's picket line handbilling, which has been inconsistent with a purely area standards object. Thus, the leaflets distributed by the Union picketers state that 24 Union employees had been unfairly terminated by the Employer when it refused to hire them after the sale in an effort to break the Union.¹⁶ The leaflets also referenced resolutions in support of those employees by the Contra Costa County Board of Supervisors and the city councils of Martinez and Pleasant Hill.¹⁷ The handbilling therefore

¹⁴ See Retail Clerks Local 1557 (Giant Foods of Chattanooga), 217 NLRB 4, 10 (1975) (8(b)(7)(C) violation where union's protest of successor's alleged discriminatory refusal to hire certain employees was inseparable from enforcing successor's alleged bargaining violation).

¹⁵ Compare Service Employees Local 250 (Shoreline South), 300 NLRB 108, 109-110 (1990) (recognitional picketing does not violate 8(b)(7)(C) if 8(a)(5) complaint outstanding).

¹⁶ See San Diego Typographical Union No. 221 (Central Graphics), 264 NLRB 874, 877 (1982) (union picketing had recognitional object, despite earlier disclaimer, where leaflets stated that employer did not employ union members).

¹⁷ We would reject any argument that the Union's February 16 letter was a valid "disclaimer" of a recognitional object, because a valid disclaimer must be clear and unmistakable. Painters Local 272 (Charles R. Curtiss), 183 NLRB 933, 938, 939 (1970); McClintock Market, 244 NLRB 555, 556 (1979). The February 16 letter did not expressly disclaim an interest in immediate recognition; it merely informed the Employer that the upcoming picketing would not be for a recognitional object and would be to protest the Employer's failure to meet the Union's area standards. Moreover, considering the other evidence of a continued recognitional object, discussed below, even an express disclaimer would be ineffective. "Self-serving disclaimers of an unlawful

reflected a continuation of the Union's earlier ULP protest, which had been inextricably intertwined with a recognitional object.¹⁸

The Union's internal March 21 memorandum, which implores its members to continue picketing the Employer, corroborates the above evidence of the Union's continued recognitional object.¹⁹ Thus, the memorandum's opening paragraph references the Employer's refusal to "recognize and negotiate" in October 2004; implies that the Union and Employer are currently embroiled in that same dispute by continuing "Since this struggle began last October"; and states that the Union had recently appeared on radio and television programs to inform the public about its "struggle" with the Employer and the Employer's "underhanded union busting tactics."²⁰ The March 21

objective are insufficient to prevent the finding of a violation." Roofers Local 11 (Funderburk Roofing), 331 NLRB 164, 167 (2000), citing Central Graphics, supra, 264 NLRB at 876.

¹⁸ See Hotel & Restaurant Employees Local 274 (Stadium Hotel Partners), 314 NLRB 982, 986 (1994) (while some picket signs contained area standards message, others contained language such as "This hotel - unfair," signifying same recognitional object as earlier unlawful picketing).

¹⁹ Teamsters Local 544 (Better Home), 274 NLRB 164, 168 (1985) (union's internal notice to members characterizing dispute as "very bitter struggle to preserve union jobs," and at two other points emphatically declaring union's purpose to "preserve these union jobs," corroborated other evidence indicating picketing had recognitional object).

²⁰ Hotel & Restaurant Employees Local 274 (Stadium Hotel Partners), 314 NLRB at 986 (union official's comments on picket line indicated that union viewed dispute as a continuing one, beginning months earlier when employer purchased hotel but did not retain the union-represented employees). Also, Union representative Rodgers' statement during the March 10 radio program that the Union sought to deter the Employer from hiring "scabs" further corroborates the above evidence of continued recognitional object. See id. at 984 & fn. 3 (references to "scabs" evidences recognitional object when context indicates union seeks replacement of "scabs" with its members in order to obtain recognition). See also Bldg. & Construction Trades Council (Altemose Construction), 222 NLRB 1276, 1279 (1976), enfd. mem. 547 F.2d 1158 (3d. Cir. 1976) (union official's statements during radio program evidenced union's unlawful organizational objective).

memorandum also states that the Union has received support for its cause from several local government bodies, including the Concord City Council. The Union likely obtained the Concord resolution in mid-March.²¹ In order to further support the argument that the renewed picketing had a recognitional object, the Region may exercise its discretion by ascertaining what resolution the Union sought from the Concord City Council and what action the Council ultimately took.²²

The Union's failure to conduct a good faith investigation into whether the Employer provides area standards, and its failure to give the Employer sufficient notice of its area standards claim, also support a finding of a recognitional object in the second round of picketing. A good faith area standards investigation must be "carried out with as great a degree of thoroughness as the circumstances will permit."²³ Here, the Union obtained information about the Employer's wages and benefits from employees. However, the Union's failure to attempt to obtain such information directly from the Employer before picketing suggests that it was interested in obtaining something other than comparable labor costs.²⁴ We note that

²¹ Thus, during the March 10 radio appearance, Union president Older stated that the Union anticipated obtaining a favorable resolution from the Concord City Council within about a week. The other resolutions appear to have been obtained during the initial round of picketing.

²² We note that the February/March issue of the Sparkplug states that the Union's objective in appearing before the Concord City Council would be to "use the political clout behind these resolutions to push the company into bargaining." See Retail Clerks Local 1357 (Genuardi Super Markets), 252 NLRB at 886 (statements in union newsletter that "we cannot let [the employer] maintain this attitude [of remaining non-union]" and that an object of the picketing was "to bring about union conditions in his 14 stores," supported finding that union's picketing had recognitional object).

²³ Sales Delivery Drivers Local 296 (Alpha Beta Acme Markets), 205 NLRB at 471.

²⁴ Teamsters Local 544 (Better Home), 274 NLRB at 170 ("the Union ignored the most obvious source of information about wages and fringe benefits, [the employer] itself, and the Union's purpose in picketing must be construed in that context").

the Union has not provided a reasonable explanation for its failure to contact the Employer as part of its area standards investigation. Moreover, the Union's letter informing the Employer that the Union would resume picketing for an area standards object was postmarked February 17 and received by the Employer on February 18 or 19. Since the avowed area standards picketing began on February 19, the Union gave the Employer little to no opportunity to demonstrate that its labor costs met the Union's area standards or to alter its wage and benefit package so that it would meet area standards. This also indicates the Union's renewed picketing, resuming a mere week after it first ceased clearly recognitional picketing in response to the charge in Case 32-CP-485-1, did not have a genuine area standards object as its sole object.²⁵

In light of the above evidence regarding the Union's continued recognitional object, the Union's failure to engage in any other area standards picketing for the past six years sheds further doubt on the Union's contention that its picketing is solely for that purpose.²⁶ The Employer has also made a related but unsupported assertion that the Union has not engaged in area standards picketing against Dirito Brothers Volkswagen, a non-Union dealership that is located next door to the Employer and pays its service technicians the same wages as the Employer. Although this would further demonstrate the Union's recognitional object, the Region should only rely on this contention if supported by actual testimony.

The Region should not base its argument that the Union's renewed picketing has a recognitional object upon

²⁵ Ibid. (union did not give employer notice or opportunity to comply with claimed area standards until morning of first day of picketing, indicating picketing had some other purpose).

²⁶ Hotel & Restaurant Employees Local 274 (Stadium Hotel Partners), 314 NLRB at 987 (union had not picketed any other hotel for substandard conditions for 12-15 months prior to the time it began its avowed area standards picketing of employer, indicating this was, at best, an ancillary or secondary reason for the union's protest); Teamsters Local 115 (Nate Ben's Reliable), 224 NLRB 388, 390 (1976) (union had not engaged in area standards picketing within the past two years, indicating the union did not have a general ongoing concern to cause the employers in the area to meet the alleged standards; moreover, the picketed company employed a relatively small complement of workers compared to the others that were not picketed).

the language on the picket signs. The picket signs, which state that the Employer is not paying "area standard health care and pension," do not evince a recognitional object on their face. While a union's attempt to dictate how the employer divides its total labor expenses between wages and benefits is deemed recognitional in nature,²⁷ the signs' general reference to "area standard[s]" negates an inference that the signs themselves sought such pro tanto bargaining.²⁸

Finally, the makeup of the area standard in this case, and the question of whether the Employer's labor costs satisfy the area standard, are irrelevant to finding a violation. As set forth above, recognition need not be the sole object for picketing to violate Section 8(b)(7)(C); it is sufficient that recognition be one of the reasons for the picketing. We have determined, based on the totality of the Union's conduct, that its second round of picketing commencing on February 19 had a recognitional object. In this context, it is not necessary for us to resolve the

²⁷ Compare Electrical Workers Local 265 (R P & M Electric), 236 NLRB 1333, 1334 (1978), enfd. 604 F.2d 1091 (8th Cir. 1979) (picket sign stating that employer did not pay "union wages and conditions" implied recognitional and organizational objective); Minneapolis Building & Construction Trades Council (Krasen Plumbing & Heating, Inc.), 229 NLRB 98, 103-104 (1977) (picketing for identical wage rate and benefits demonstrates recognitional object); San Francisco Local Joint Executive Board (Jack-In-The-Box), 203 NLRB 744, 746 (1973), enfd. in pertinent part 501 F.2d 794 (D.C. Cir. 1974) (picket signs stating that employer operates under "non-union conditions" constituted a request that the union assume the role of bargaining representative regarding virtually all terms and conditions of employment, and therefore evidenced recognitional objective).

²⁸ See Electrical Workers Local 453 (Southern Sun Electric Corp.), 242 NLRB 1130, 1132 (1979), revd. and remanded 620 F.2d 172 (8th Cir. 1980) (picket sign reference to substandard "wages, benefits, and working conditions" is not a request for compliance with all working conditions in union's contracts, and therefore do not evidence recognitional object, in contrast to other cases where signs only refer to "non-union conditions" without context of "wages" or "benefits"); Orange County District Council of Carpenters (Gordon Builders, Inc.), 227 NLRB 832, 842 (1977) (picket sign stating that employer "does not comply with AFL-CIO standards and conditions" does not imply recognitional object; inclusion of term "standards" is significant).

legitimacy of any area standards dispute the parties may or may not have.

B.J.K.